91-1281

Supreme Court, U.S.
FILED
FEB 6 1992
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No. 91 _____

In The

Supreme Court of the United States

October Term, 1991

GERALD M. POPKIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Eleventh Circuit Court of Appeals violated Petitioner's Right to Due Process of Law, when it affirmed his conviction under Title 26 §7212 for forming a corporation to disguise illegal income, but where Petitioner was not charged with a specific violation of the tax laws or with any other criminal conduct?

II.

Whether the Eleventh Circuit Court of Appeals misconstrued the meaning of Title 26 §7212 in refusing to limit it to conduct which involves forcible interference with the administration of the tax code or assault on a government agent?

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OPINION BELOW

The Opinion affirming Petitioner's conviction is reported at United States v. Gerald M. Popkin, 943 F.2d 1535 (1991).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eleventh Circuit issued its Opinion on October 9, 1991. Petitioner's motion for a re-hearing was denied on November 13, 1991. Pursuant to Supreme Court Rule 13. 4, the present petition for a Writ of Certiorari was required to be filed within ninety days of the denial of Petitioner's motion for a re-hearing. Jurisdiction of this court is invoked under 28 U.S.C. §1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment to the United States Constitution provides:

> [N] or be deprived of life, liberty or property without due process of law.

2. Title 26 §7212(a) provides:

> Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall upon conviction thereof, be fined not more than $5,000, or imprisoned not more than three years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than one year, or both. The term "threats of force," as used in the subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

STATEMENT OF THE CASE

Petitioner was originally charged in the indictment with Count I, charging a violation of 26 U.S.C. §7206(2) for assisting in the preparation of a false or fraudulent 1983 tax return; Count II, charging a violation of 26 U.S.C. §7206(2) for assisting in the preparation of a false or fraudulent 1984 tax return; and count III, charging a violation of 26 U.S.C. §7212(a) for endeavoring to impede the due administration of Title 26 by preparing the false tax returns described in Counts I and II and by creating a California corporation for the purpose of disguising the character of illegally earned income.

The facts giving rise to the indictment are as follows. In 1978, Petitioner, then an attorney-at-law, was contacted by Stephen Musick, who asked the Petitioner to prepare for him his 1977 income tax return. In 1985, the Petitioner was again contacted by Stephen Musick, who this time asked that the Petitioner prepare 1983 and 1984 income tax returns, and explained that he needed to bring into the country some offshore money which had been held for him by two of his partners while he was serving time in prison on the cocaine deal which had generated this income. He also requested legal assistance in the preparation of incorporation of his new business. Petitioner prepared the returns and stated on each return that Mr. Musick's income for each respective year was $50,000, an amount which the government claimed falsely stated Mr. Musick's purported income for those two years. Petitioner also set up a California corporation on behalf of Mr. Musick, and proposed that he sell shares of stock in the corporation to certain of Mr. Musick's business partners. What Petitioner did not know was that, subsequent to his initial contact with Mr. Musick in 1978, and prior to their resumption of contact in 1985, Mr. Musick had entered into a deal with the government relative to Mr. Musick's interven-

ing drug activity, and that the 1985 meetings were part of a government sting operation. The tax returns were prepared but never filed and the corporation was set up for the business partners who turned out to be goverment agents.

A jury trial was commenced on July 9, 1990, and continued through July 13, 1990. At trial, Count III of the indictment was amended to delete references to the tax returns described in Counts I and II, leaving the redacted charge that Petitioner corruptly obstructed or impeded and endeavored to obstruct and impede the due administration of Title 26 by creating the Stephen Musick Corporation. Petitioner filed a motion to dismiss all counts for failure to state an offense within the statute, as well as a motion for judgment of acquittal with respect to all three counts. Both motions were denied.

On July 13, 1990, the jury returned a verdict of not guilty on Counts I and II. It returned a verdict of guilty on Count III. Petitioner's motion to set aside the verdict was denied, and on September 14, 1990, Petitioner was sentenced to a term of imprisonment of one year plus one day.

On September 17, 1990, Petitioner filed a notice of appeal from the judgment. On October 9, 1991, the United States Court of Appeals for the Eleventh Circuit issued its opinion affirming the judgment. A-l. One justice of the court disserted for the opinion. On November 13, 1991, Petitioner's motion for a re-hearing was denied. A-2. This petition for a writ of certiorari ensues.

ARGUMENT

I. WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW, WHEN IT AFFIRMED HIS CONVICTION UNDER TITLE 26, §7212 FOR FORMING A CORPORATION TO DISGUISE ILLEGAL INCOME, BUT WHERE PETITIONER WAS NOT CHARGED WITH A SPECIFIC VIOLATION OF THE TAX LAWS OR WITH ANY OTHER CRIMINAL CONDUCT?

Conviction under a statute that fails to state a crime, constitutes a due process violation under the Fifth Amendment. It has been held that persons may not be required at peril of life, liberty or property to speculate concerning the meaning of a penal statute, but all are entitled to be informed concerning what the state commands or forbids. Lanzetta v. New Jersey, 306 U.S. 451 (1939). A penal statute creating an offense must be sufficiently explicit to inform those subject to it what conduct will render them liable to its penalties, and a statute forbidding or requiring doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application is repugnant to the due process clause of the federal constitution. Lanzetta, supra at 460.

In the instant case, Petitioner was charged in Count III with corruptly obstructing or impeding or endeavoring to obstruct or impede the due administration of the tax laws. It was not alleged, as part of that count, that he so endeavored to obstruct or impede, by violating any tax laws or committing any other type of crime. He was charged merely with setting up the Stephen Musick Corporation, ostensibly for the purpose of creating a tax shield or disguising the nature of illegally generated income. In other words, the sine qua non of the offense charged was that Petitioner formed a corporation. The activity which was alleged to be the means by which Petitioner accom-

plished his obstruction was legal, and not illegal, activity. It has been held that where the act complained of is of itself legal conduct, even if done with the purpose to obstruct, then §7212 (a) has not been violated. United States v. Hylton, 710 F.2d 1106 (5th Cir. 1983).

In Hylton, defendant and her husband had been long-time foes of the federal tax laws. They eventually sent a notice to the IRS informing its agents that they were not welcome on their property, and posted "no trespass" signs as well. In 1981, the IRS began investigating defendant's son for tax activity and entered defendant's property to inquire about the son's whereabouts. The next day defendant filed a criminal complaint with the county attorney for trespass by the agents. Thereafter, defendant was indicted in federal court with a violation of 26 U.S.C. §7212(a) for corruptly endeavoring to impede the IRS agents in their official capacity. The district court sustained a motion for judgment of acquittal, stating that "even assuming the evidence to have established beyond any doubt that the defendant acted with the sole purpose of obstructing the investigation of the two IRS agents", Hylton, supra, at 1110 (quoting the district court memorandum), §7212 was not violated as a matter of law, because the activity complained of was not itself illegal or fraudulent. Indeed, because the complaints for trespass were factually accurate, no violation had occurred. The 5th Circuit affirmed the district court, looking, as the lower court did, to the nature of the underlying conduct, not its purpose.

The instant case is on all fours. Petitioner was within his lawful right to set up a corporation. And even if the reason he did so was arguably to obstruct or impede the administration of the tax code, the underlying act was not itself corrupt. Senior Circuit Judge Roney makes this very point in his dissent to the panel's opinion below. Because the indictment as amended deleted the allegations concerning the preparation of false re-

turns, leaving the sine qua non of the offense the formation of the corporation - and because the formation of a corporation is not an inherently corrupt act, then the elements of §7212 (a) have not been met nor the meaning of the statute given its true effect. 1

Indeed, almost every case involving a prosecution under §7212(a) has involved an underlying act which was itself illegal or corrupt, as for example, in United States v. Ratcliff, 806 F.2d (5th Cir. 1986), where the underlying act was threatening phone calls to an IRS agent; United States v. Johnson, 462 F.2d 423 (2nd Cir. 1972), where the underlying act was an assault on arresting agents; and United States v. Varani, 435 F.2d 758 (6th Cir. 1970), where the underlying act was letter threats of violence against an agent. To expand or extend §7212 (a) to encompass an act like Petitioner's here - creating a corporate entity to repatriate funds located in an offshore account back into this country, would be to permit an overbroad sweep by the statute to include within its reach "any and all efforts to evade taxation." United States v. Popkin, Slip Option, A-1, page 70. Such an unfettered sweep would criminalize behavior without informing persons that the behavior is criminal, and is the kind of due process violation which concerned this court Lanzetta.

Petitioner submits that the 11th Circuit majority misinterpreted and misapplied §7212 (a) to the facts of this case.

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1 Judge Roney also makes the point that in fact Petitioner's conduct was a classic example of money laundering. However, as 18 U.S.C. §1956 was not passed until 1986 and the acts complained of occurred in 1985, the government had to go shopping for a statute under which to charge the conduct. Unfortunately, no statute on the books at the time criminalized conduct such as Petitioner's. In all likelihood, Congress perceived a gap in the various federal statutes in effect in 1985, through which setting up a corporation to receive drug funds fell. By the same argument, §7212 (a) was not meant to and did not prohibit the type of conduct committed by Petitioner, and was improperly charged in this case. Had the conduct occurred a year later, when §1956 had been enacted and taken effect, it is doubtful that Petitioner would have been charged under §7212 (a).

Accordingly, Petitioner respectfully requests that this court grant certiorari.

II. WHETHER THE ELEVENTH CIRCUIT COURT OF APPEALS MISCONSTRUED THE MEANING OF TITLE 26 §7212 IN REFUSING TO LIMIT IT TO CONDUCT WHICH INVOLVES FORCIBLE INTERFERENCE WITH THE ADMINISTRATION OF THE TAX CODE OR ASSAULT ON A GOVERNMENT AGENT?

In affirming Petitioner's conviction, the llth Circuit Court of Appeals held that 26 U.S.C. §7212(a) need not be limited to those circumstances where the accused has wielded force or threats against the person of a particular government employee. As this interpretation of the statute conflicts with other federal circuit court rulings, and is inconsistent with recorded legislative intent, Petitioner respectfully requests that the Court grant certiorari on this question.

§7212(a) of Title 26 (Internal Revenue Code) reads as follows:

Corrupt or Forcible Interference

> Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall upon conviction thereof, be fined not more than $5,000, or imprisoned not more than three years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than one year, or both. The term "threats of force" as used in the subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

It is the meaning of the latter half of this statute which is in dispute, namely, the language which reads, "or in any other way corruptly or by force or threats of force...obstructs or impedes or endeavors to obstruct or impede the due administration of this title." According to the 11th Circuit, this language encompasses any corrupt conduct and is not limited to conduct directed at or against a particular government agent or employee. This interpretation, however, flies in the face of legislative history, and rulings in other circuits.

In ruling that the latter portion of §7212(a) encompasses generally corrupt conduct whose purpose is to obstruct the IRS, the 11th Circuit reasoned that the clause was an "omnibus" clause, and thus broad in its sweep. To support this interpretation of §7212(a), the 11th Circuit relied solely on an entirely different statute borrowed from another title of the federal code, 18 U.S.C. §1503. 2 However, "[w] ithin our federal constitutional framework the legislative power, including the power to define criminal offenses, and to prescribe the punishment to be imposed upon those found guilty of them, resides with the Congress." Whalen v. United States, 445 U.S. 684, 659 (1980). The separation of powers doctrine includes the principle that federal courts do not possess the inherent authority to manufacture crimes or criminal punishment. Id. Thus, absent clear intent expressed in either the language or legislative history of §7212(a) that it is to be construed by the courts as an "omnibus obstruction" statute, Petitioner respectfully submits that this Court should not interpret it as such. The legislative history that follows will demonstrate the true goals of §7212(a) as written by Congress.

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2 In his dissent, Judge Roney makes the point that 18 U.S.C. §1503, to which the majority of the panel analogizes 26 U.S.C. §7212, carries within its meaning a retaliatory element against the IRS or one of its agents. If the 11th Circuit is truly going to analogize the two statutes, then §7212 must have this same retaliatory element. That element did not exist in the instant case.

§7212(a) originates from §38 of the Internal Revenue Service Act of 1864 which provided:

> That if any person shall forcibly obstruct or hinder any assessor or assistant assessor, or any collector or deputy collector, revenue agent or inspector, in the execution of this act, or of any power and authority hereby vested in him, or shall forcibly rescue, or cause to be rescued, any property, articles, or objects, after the same shall have been seized by him, or shall attempt or endeavor to do so, the person so offending shall, upon conviction thereof, for every such offense, forfeit and pay, the sum of $500, or double the value of the property so rescued or be imprisoned for a term not exceeding two years, at the discretion of the court....Ch. 173, Stat. 238.

The 1939 Internal Revenue Code split the prohibited acts of §38 into two subsections:

> §3601(c) : If any person shall...(l)...[f]orcibly obstruct or hinder any collector, deputy, collector, Internal Revenue agent, or inspector, in the execution of any power and authority vested in him by law, or... (2) [f]orcibly rescue or cause to be rescued any property, articles, or objects after the same shall have been seized by him, or shall attempt or endeavor to do so, the person so offending, excepting in cases otherwise provided for, shall, for every such offense forfeit and pay the sum of $500, or double the value of the property so rescued, or be imprisoned for a term not exceeding two years, at the discretion of the court.

The modern version of §7212(a) was enacted as part of the Internal Revenue Code of 1954. The House of Representatives proposed that the new section be similar to 18 U.S.C. §111 which prohibited the forceful assault of a federal employee engaged in the performance of his duties. The House wanted to heighten the protection afforded Internal Revenue employees by "covering all cases where the officer is intimidated or injured; that is, where corruptly, by force or threats of force,

directly or by communication, an attempt is made to impede, the administration of the Internal Revenue laws." H.R. Rep. No. 1337, 83d Cong., 2d Sess., reprinted in [1954] U.S. Code Cong. & Ad. News at 4017, 4136.

The Senate version of the new section was also more expansive than 18 U.S.C. §111 "in that it covered threats of force (including any letter or communication) or corrupt solicitation." S. Rep. 83d Cong., 2d Sess., reprinted in [1954] U.S. Code Cong. & Ad. News at 5254. The Senate version included the House provision regarding forceful intimidation of federal employees, but classified this provision as a misdemeanor rather than a felony.

After a conference on the difference between the House and Senate versions of the proposed Internal Revenue Code, the Conference Committee accepted the Senate version of §7212 (a). H.R. Rep. No. 2543, 83d Cong., 2d Sess., reprinted in [1954] v.s. Code Cong. & Ad. News at 5344.

The purpose behind Congress' enactment of the current version of §7212(a) is illustrative of its goals. According to the legislative history, prior to the adoption of the current version of §7212(a), neither the criminal provisions of the Internal Revenue Code nor the provisions of the federal penal code, Title 18, protected Internal Revenue Service employees from intimidation by means of threats of force. The current version of §7212(a) was enacted to rectify this by including such intimidation within the scope of conduct made criminal by the act. The purpose, therefore, was to add intimidation achieved through the threat of force to the list of criminal offenses which already included forcible assault upon an Internal Revenue Service employee in both felony provisions of §7212(a) and 18 U.S.C. §111. It should also be noted that the government itself made this identical argument in the case of United States v. Henderson, 386 F.Supp. 1048 (S.D.N.Y. 1974); the government

argued there that §7212 applied only to conduct involving force or threats of force. Henderson, supra at 1055-1056.

Thus, it is clear what type of conduct §7212 (a) prohibits. The language and legislative history are very specific. §7212(a) encompasses two different types of obstructions to the effective operation of the Internal Revenue laws: "interference with officers or employees of the Internal Revenue Service who are acting in an official capacity" and interference in "any other way" with "the due administration of the Internal Revenue laws, a broader range of prohibited behavior, with different penalties creating different classes of offenses depending on whether the defendant acted through corrupt solicitation or with force, on the one hand, or merely through the use of a threat of force, on the other hand. United States v. Walker, 514 F.Supp. 294 (E.D. La. 1981).

The court in Walker specifically noted that "this Section [7212 (a)] of the Internal Revenue Code is designated to protect the Internal Revenue Service, and its officers and employees, from three different types of harms: (1) corrupt solicitation; (2) forceful interference with the operation of the Internal Revenue laws; and (3) the threat of forceful interference with the operation of those laws... A felony violation of §7212(a) requires proof of corrupt solication or the use of force while a misdemeanor violation of this statute requires proof of the threat of force." Walker, supra at 298.

By dividing the conduct envisioned by §7212 into a felony class and a misdemeanor class, the Walker court arguably described all conduct which it considered to be included within the statute. Interference with the operation of the IRS as an agency was not included, nor contemplated. See also, United States v. Sciolino, 505 F.2d 586, 588 n.3 (2d Cir. 1974) (discussing elements necessary for conviction under 18 U.S.C. §111 and §7212(a).)

Considered in light of the statutory language of §7212(a), its legislative history and the Congressional purpose behind the act, §7212(a) is not ambiguous, and "[w]here Congress has manifested its intention, we [courts] may not manufacture ambiguity in order to defeat that intent." Bifulco v. United States, 447 U.S. 381, 387 (1980). Moreover, a review of caselaw will demonstrate that the courts have not construed §7212(a) so as to "manufacture ambiguity," but instead have recognized the factual circumstances as fitting within the exact type of conduct which Congress sought to prohibit through §7212(a).

The courts have consistently applied §7212 (a) to factual settings in which the defendant assaults, interferes with, obstructs, or in any other fashion impedes a particular Internal Revenue agent in his official capacity in administering the Internal Revenue laws. In most cases, the Internal Revenue Service has had some prior contact with the defendant and it is usually as a result of that prior contact that the defendant feels that it necessary to act. In most cases, it is entirely retaliatory. In addition, the courts appear to be construing the first part of §7212(a) as describing the "victim" [ie. an Internal Revenue Agent acting in his/her official capacity], and the second part as describing what the particular agent is doing at the time of the defendant's actions [ie. administering the Internal Revenue laws]. Such an interpretation is entirely consistent with the spirit of §7212(a) and Congress' intent.

Not only is the legislative intent behind 7212(a) clear in its purpose, but cases construing or applying 7212 (a) have consistentlv and exclusivelv done so only in cases of threats or force directed against an IRS agent.

The following cases involved prosecutions under §7212(a) :

United States v. Guthrie, 385 F.2d 410 (7th Cir. 1967) : The defendant, whose income tax returns had been under investi-

gation by the Internal Revenue Service, declared to his accountant that "he might shoot any government agents who approached him in connection with the investigation." The accountant informed the Internal Revenue Service about the threats and about seeing a gun in the defendant's truck. During their investigation, two Internal Revenue agents, acting on the basis of the information from the accountant, observed the gun in the defendant's vehicle, and stopped the defendant on the street to question him. The offenses were committed when, after they showed him their credentials and informed him of his constitutional rights, the defendant told the agents that he would not talk to them and that he was going home and struck one of the officers as he walked toward his truck. The other officer then informed the defendant that he was under arrest; the defendant refused to stop; and he used force to resist the officer.

United States v. Rybicki, 403 F.2d 599 (6th Cir. 1968) : The court reversed the defendant's conviction under §7212 (a) because of an erroneous instruction but held that a jury could find that the defendant knew that the men who were in the act of moving his truck were officers of the Internal Revenue Service and were then acting in their official capacity. After the agents knocked at the defendant's door and received no response, they began to remove the vehicle, during which time the defendant appeared in his doorway, holding a double-barreled shotgun.

United States v. Varani, 435 F.2d 758 (6th Cir. 1970) : Portions of a letter which the defendant sent to an Internal Revenue Service agent who had attempted to collect income taxes due from the defendant, stated that any force used to seize his property would be "met with a superior force;" that he had "an itchy trigger finger more deadly than when he was fighting in World War II;" and, that "for the agent's own well being, he

must not become personally involved in an effort to seize the defendant's property or the defendant would hold him personally responsible." Other evidence cited by the court included the defendant's statements to the agent that he was an expert rifleman and would "blow the agent's head off."

United States v. Johnson, 462 F.2d 423 (2nd Cir. 1972) : Officers arrived at the premises occupied by the defendant's tenant to remove the tenant's property, which had been posted with notices of seizure for nonpayment of taxes; defendant informed them that he would bar their entrance into the building and that they could enter only over his dead body. When the defendant refused to move, he was placed under arrest, and when he refused to submit and the agents attempted to remove him, a scuffle ensued and one of the agents was assaulted.

United States v. Sciolino, 505 F.2d 586 (2nd Cir. 1974) : This case involved proof of a flash photograph of the agent taken at close range by the defendant "for posterity", in his words, "so I can show it around and say this is the guy, " and defendant's ostentatious display of a cartridge box bearing the label "Smith and Wesson, .38 Chief Special", accompanied by his discourse on the nature of men as "uncivilized beings who delight in violence and killing." The last incident occurred at a time when the defendant possessed a pistol permit and was refusing the Internal Revenue Service agent's request for production of evidence directly relevant to the audit the agent was conducting.

United States v. Hylton, 710 F.2d 1106, 1108 (5th Cir. 1982) : The Fifth Circuit affirmed setting aside the tax protestor's conviction of a "charge, under §7212(a), for corruptly endeavoring to impede Internal Revenue agents in their official capacity by filing nonfraudulent criminal trespass claims against them." The court ruled that the defendant's conduct in filing the

trespass claims represented a protected exercise of her constitutional right to petition for redress of grievances, notwithstanding that the complaints may have been motivated by a desire to impede the agent's investigation.

United States v. Reeves, 752 F.2d 995 (5th Cir. 1985): This case involved a defendant's filing of a "common law lien" in the deed records office against the residence of a criminal investigator with the Criminal Investigation Division of the Internal Revenue Service, who had been investigating the defendant's income tax returns for the years 1979, 1980, and 1981. The 5th Circuit reversed the defendant's conviction under §7212 (a) for "corruptly endeavoring to obstruct the due administration of the Internal Revenue Code. " The court held that the district court had erred in adopting "with improper motive or bad or evil purpose" as the definition of "corruptly"; instead the court defined it as "intent to give some advantage inconsistent with the official duty and rights of others under the tax laws". Reeves, supra at 1000, (citing United States v. Ogle, 613 F.2d 233, 238 (9th Cir. 1979). In dicta, the court indicated: "In the present case, it may be that Reeves meant to impede or intimidate officers or agents of the Internal Revenue Service from collecting his just debt of taxes due or from scrutinizing his tax accounts; or it may be that he engaged in this conduct to secure an improper advantage or benefit for other unnamed persons, or groups of persons. If this is the case, his actions constituted a corrupt endeavor under §7212(a). " Id. This is the only case in which the Internal Revenue Service, as an entity, could serve the role of the "victim" of a defendant's conduct under §7212 (a). There is nothing to indicate that the court was announcing any new interpretation of the statute to be carried forth in subsequent cases, where the "person" to be impeded or obstructed is the Internal Revenue Service as a collective entity. Nonetheless, this passage is dicta and its dominance should be construed accordingly. In his concurrence, Circuit Court Judge Gee

stressed that "the essence of §7212(a) seems to be the attempt to influence or impede the government's agent's official actions..." Reeves, supra at 1002.

United States v. Ratcliff, 806 F.2d 1253 (5th Cir. 1986) : The Houston branch of the Internal Revenue Service instituted proceedings against the defendant in order to collect money he owed in personal income tax. A Revenue officer administratively seized one of the defendant's bank accounts and placed liens on several pieces of the defendant's property. Soon after, the defendant made threatening phone calls to the Internal Revenue agent and was charged with interfering with the administration of the Internal Revenue laws in violation of §7212(a). The defendant was convicted of endeavoring to intimidate and interfere with Internal Revenue Service employees by threats of force and bodily harm.

In sum, the cases are few but very clear as to the proper interpretation of §7212(a). In each case, there appears to be a retaliatory element. That did not exist in the instant case, where there was no prior investigation, audit or proceeding being conducted by an agent whom the Petitioner was attempting to impede. Indeed, this was not a case where Mr. Musick came to the Petitioner and said, "The IRS is investigating me. See what you can do to get them off my back"; Petitioner had no reason to think and did not know that the IRS was involved. He had no reason to retaliate against any particular Internal Revenue agent, nor did he have any motive to obstruct any particular agent's administration of the Internal Revenue laws. In fact, there was no evidence whatsoever which would indicate that the Petitioner was dealing directly with a particular IRS agent whose job he was attempting to thwart. Petitioner's only act was to set up a corporation, arguably to disguise or launder drug money. As such, the 11th Circuit misconstrued §7212(a) in applying it to the facts of this case, or in extending its reach to

include non-forcible, non-retaliatory conduct. Petitioner respectfully submits this is a bonafide basis for the granting of certiorari.

CONCLUSION

Petitioner respectfully requests that the petition for writ of certiorari be granted and that the judgment of the 11th Circuit Court of Appeals be reversed.

Respectfully submitted,
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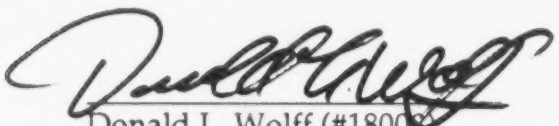

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APPENDIX

U.S. v. POPKIN

**UNITED STATES of America,
Plantiff-Appellee.**

v.

**Gerald M. POPKIN, Defendant-
Appellant.**

No. 90-8961.

United States Court of Appeals,
Eleventh Circuit.

Oct. 9, 1991.

Defendant was convicted in the United States District Court for the Northern District of Georgia, No. 1:90-CR-7-1, J. Owen Forrester, J., of corrupt interference with due administration of Internal Revenue Code, and he appealed. The Court of Appeals, Lively, Senior Circuit Judge, sitting by designation, held that: (1) governing statute did not require force or threats of force directed at specific agent or employee, and (2) evidence was sufficient to support conviction.

Affirmed.

Roney, Senior Circuit Judge, filed dissenting opinion.

1. Internal Revenue §5264

Statute making it unlawful "in any other way corruptly or by force or threats of force" to obstruct or impede or endeavor to obstruct or impede due administration of Internal Revenue Code does not require force or threat of force directed at specific agent or employee. 26 U.S.C.A. §7212(a).

See Rule 34-2(b), Rules of the U.S. Court or Appeals, for the Eleventh Circuit.

2. Internal Revenue §5264

Word "corruptly" in statute making it unlawful "in any other way corruptly or by force or threats of force" to obstruct or impede or endeavor to obstruct or impede due administration of Internal Revenue Code forbids those acts done with intent to secure unlawful benefit either for oneself or for another. 26 U.S.C.A. §7212(a).

See publication Words and Phrases for other judicial constructions and definitions.

3. Internal Revenue §5295

Conviction of attorney for corrupt interference with administration of Internal Revenue Code was supported by evidence that attorney created corporation to enable client to disguise character of income earned on drug deals and repatriate it, while avoiding reporting income in taxable year earned. 26 U.S.C.A. §7212(a).

Appeal from the United States District Court for the Northern District of Georgia.

ANDERSON, Circuit Judge, RONEY* and LIVELY**, Senior Circuit Judges.

LIVELY, Senior Circuit Judge:

The defendent, Gerald M. Popkin appeals from his jury conviction for violating 26 U.S.C. §7212(a), one of the provisions of Chapter 75 of the Internal Revenue Code, which creates a number of tax crimes. Specifically, §7212 criminalizes attempts to interfere with administration of internal revenue laws, and subsection (a) prohibits corrupt or forcible inteference.

The defendant contends that neither the activities referred to in the indictment nor those revealed by the evidence constitutes a crime under §7212(a).

**Honorable Pierce Lively, Senior Circuit Judge of the Sixth Circuit, sitting by designation.

I.

A.

The criminal charges against the defendant stem from a government sting operation conducted by Stephen Musick. Musick earned approximately $250,000 in 1977 through his involvement in drug transactions. In 1978, Musick requested and received assistance from the defendant, who was then a practicing attorney, in preparing 1977 tax returns which misrepresented the source and amount of Musick's 1977 income. The defendant had no further contact with Musick until 1985.

Musick was arrested in 1982 for selling approximately 12 kilograms of cocaine. While serving his prison term, Musick provided information to federal agents regarding his 1978 dealings with the defendant. After acquiring this information, government agents requested and Musick agreed to participate in a sting operation directed at the defendant.

Musick contacted the defendant in March 1985 and requested a meeting at the defendant's law office in Atlanta. Unaware that Musick was now acting in cooperation with the government, the defendant agreed to the meeting, which was recorded by Musick with a concealed audio recording device. Musick informed the defendant that he had earned approximately $200,000 on cocaine deals while he was in prison and that he now wanted to resurface and start showing income by filing tax returns for 1983 and 1984 and by getting into the construction and real estate business in California. Musick informed the defendant that his money from the drug deals was being held by an entity called Mid-American Financial in an offshore account and that he desired assistance in repatriating the money in a transaction that would disguise the source of the funds and require paying less than full income taxes.

The defendant recommended that he form a California corporation for Musick, that Musick sell stock in the new corporation to Mid-America Financial for $200,000, report heavy losses in the new corporation and then repurchase the stock for $3,000 to $10,000. The defendant cautioned Musick to comply with the

formal requirements for running a corporation in order to maintain the proper corporate appearance. Later that same day, Musick arranged to meet with the defendant and two undercover agents posing as representatives of Mid-America Financial. The parties discussed formation of Musick's new corporation and methods of repatriating Musick's offshore funds.

In April 1985 the defendant met again with Musick and the two undercover agents in a video taped meeting at Mid-America's offices in St. Louis. At this meeting, the defendant delivered to Musick tax returns for the years 1983 and 1984 that the defendant had prepared. The defendant had reported $50,000 as gross income on Schedule C of the tax returns for each year. This sum was reported only as gross receipt or sales without any further indication of its source. These tax returns were never filed.

Subsequent to these meetings, the defendant set up the S. Musick Corporation in California, obtained a corporate seal which he mailed to Musick, and filed a statement of domestic stock corporation with the State of California. The defendent billed Musick a total of $1,755 for costs associated with formation of the corporation. This bill was paid by Mid-America Financial. The defendant also received $5,000 for preparation of the two income tax returns.

B.

The defendent was charged in a three count indictment in January 1990. Counts I and II of the indictment related to defendant's actions in preparing Musick's tax returns for 1983 and 1984. The defendant was acquitted on these counts but was convicted on count III, which charged the defendant under 26 U.S.C. §7212(a) by alleging that Popkin

> did corruptly obstruct and impede and endeavored to obstruct and impede the due administration of Title 26, United States Code, by preparing the tax returns described in Counts One and Two above and by creating a California corporation for Stephen Musick expressly for

> the purpose of enabling the said Stephen Musick to disguise the character of illegally earned income and repatriate it from a foreign bank.

At trial, count III of the indictment was amended to delete references to the tax returns described in counts I and II of the indictment, and the jury considered it as redacted. The charge against the defendant in count III of the indictment was thus based solely on the allegation that defendant corruptly obstructed and impeded and endeavored to obstruct and impede the due administration of Title 26 by creating the S. Musick Corporation.

In a pretrial motion, the defendant moved the district court to dismiss count III of the indictment for failure to state an offense within the statute. The defendant argued that §7212(a) requires the exercise of force, intimidation or other menacing conduct directed against the person of a specific federal agent and that no such conduct was involved in the defendant's assistance in forming the S. Musick Corporation. The district court denied this motion at the commencement of the trial in July 1990.

At trial, the defendant moved for a judgment of acquittal on count III at the close of the government's evidence and at the close of all evidence, in each instance contending that count III failed to state an offense within §7212(a). These motions were denied. On July 13, 1990, the jury returned a verdict of guilty on count III of the indictment. The defendant filed a motion to set aside the jury verdict, which was denied by the district court. The defendant was sentenced to one year and one day in prison and ordered to pay restitution to the government of $6,755, and this appeal followed.

II.

Decision of this case hinges on our construction of 26 U.S.C. §7212(a), which provides:

> **§7212. Attempts to interfere with administration of internal revenue laws**

(a) Corrupt or forcible interference

Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threaten- ing letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

A.

In his opening brief the defendant made but one argument—that it is an essential element ot §7212(a) that the act or conduct of the accused involve the use of force or threats of force against the person of a particular government agent. Thus, he argued, "[a]s the government failed in this case to prove any type of assaultive conduct or force, or any type of conduct whatsoever directed at or against a specific employee," he was entitled to a judgment of acquittal under count III. The defendant recognized that he was charged under "the latter half" of the statute, but contended that this portion of §7212(a) requires the same element of force or threats of force as the first clause. He also repeated his assertion at trial that the statute requires that the force or threats be directed at an individual agent: "Interference with the operation of the IRS *as an agency* was not included, nor contemplated." (emphasis in brief).

The defendant sought to buttress this argument by stating that no reported case has involved a §7212(a) prosecution where there was not an allegation that the defendant used force or threats of force to intimidate or otherwise prevent or attempt to prevent a particular IRS agent from performing his or her

official duties. He then listed eight cases from four circuits in which the element of force against a particular agent was charged. Although he conceded that §7212(a) is not ambiguous, the defendant argued that the text of previous similar statutes and the legislative history of the present statute, adopted as part of the Revenue Act of 1954, reinforce his interpretation.

In his reply brief, for the first time, the defendant argued that there was no evidence that the only act charged in the redacted indictment—creating a California corporation for Musick to disguise the character of illegally earned income and repatriate it—either obstructed or was intended to obstruct or impede the due administration of the Internal Revenue Code.

B.

The government's straightforward response to the defendant's principal argument was that the plain language of the second clause of §7212(a) makes it clear that force and threats of force are not required. That clause, under which the defendant admits he was charged, makes it unlawful "in any other way corruptly or by force or threats of force" to obstruct or impede or endeavor to obstruct or impede the due administration of the tax laws. (emphasis added). The first clause does require force or threats of force, but the second clause is joined to the first by the disjunctive "or," indicating a broad range of other activities that may obstruct or impede administration of the tax laws.

The government also asserted that other courts had rejected the contention that §7212(a) requires acts aimed at a particular agent and identified one prosecution under the section that only charged an obstruction or impediment to the agency's administration of the Code where no particular agent was involved.

In arguing that the second clause of §7212(a) contemplates and condemns a broad and inclusive range of conduct the government cited cases interpreting similar "omnibus clauses" in parallel obstruction of justice statutes. See 18 U.S.C. §§ 1503, 1505. The courts have held, according to the government, that similarly inclusive language in the general obstruction of jus-

tice statutes has been held to give notice of the range of acts that are prohibited and criminalized by those statutes. Thus, the broad language does not create a due process problem.

Noting that the defendant admits that §7212(a) is not ambiguous, the government argued that resort to the scant legislative history of §7212(a) is not required and, indeed, would be improper. The government also contended that the litany of cases in which force or threats of force were alleged does not alter the plain meaning of the statute.

C.

Much of the discussion at oral argument centered on the word "corruptly." The question raised was whether the obstructing or impeding act charged in an indictment must be, in and of itself corrupt, or whether an otherwise lawful act could violate the statute by being carried out for a corrupt purpose or in a corrupt manner. It is clear that §7212(a) does not prohibit and punish money laundering, as such. It was suggested that unless "corruptly" has some meaning that transforms an otherwise legal act[1] into forbidden action, the mere formation of a corporation to repatriate allegedly tainted money could not be considered a violation of this particular statute. This discussion related to the defendant's claim that neither count III nor the evidence supported a conviction for violating §7212(a).

III.

A.

[1] Turning first to the defendant's principal argument—that §7212(a) requires an allegation and proof of force or threats of force directed at a specific agent employee—we find little support for this contention. The first clause does require an endeavor to intimidate or impede an officer or employee by force or threats of force, or corruptly. The second clause, however, while retaining the requirement that the accused act

1 At the time of the defendant's actions, there was no federal statute that made money laundering a crime. In 1986, Congress enacted such a statute. See 18 U.S.C. §1956 (1982 ed. Supp. IV).

corruptly, greatly expands the reach of the statute by providing that it is violated if a person "in any other way," either corruptly or by force or threats of force does the prohibited act. And here, the prohibited act need not be an effort to intimidate or impede an individual officer or employee. Instead, this clause prohibits any act that either obstructs or impedes or endeavors to obstruct or impede, the "due administration" of the Internal Revenue Code.

The defendant's interpretation would render the insertion of "in any other way" and the use of "the due administration of this title" in place of "any officer or employee of the United States" in the second clause meaningless. The defendant argues that the government has never used §7212(a) for prosecutions in which there was not a claim of the use of force or threats of force against an individual agent or employee. This proves nothing. The defendant cited eight court of appeals decisions under §7212(a), all of which involved force or threats of force against government representatives. The government cited *United States v. Hatchett*, 918 F.2d 631 (6th Cir. 1990). Among other charges in *Hatchett*, one count sought conviction for a violation of §7212(a) based on a scheme for obstruction of tax collections that was aimed only at the Internal Revenue Service, not at an individual agent.

As the Supreme Court stated in *Parr v. United States*, 363 U.S. 370, 391, 80 S.Ct. 1171, 1183, 4 L.Ed.2d 1277 (1960), "We agree ... that the fact there is no reported decision involving similar factual circumstances or legal theories is not determinative." What is determinative is the clear language of the statute. The second clause conspicuously omits the requirement that conduct be directed at "an officer or employee of the United States government." The defendant concedes that §7212(a) is not ambiguous, and the different language used in the second clause indicates an intent to sweep more broadly than the language of the first clause.

B.

The remaining question with respect to the proper construction of §7212(a) concerns the twice-used word "corruptly." In

United States v. Martin, 747 F.2d 1404 (11th Cir. 1984), this court dealt with a defendant's attempt to limit the meaning of §7212(a)'s second clause. After reviewing the text and legislative history of the statute, the court found that the legislative history does not purport to limit the broad language of the statute. "Congress was not required to list in the legislative history every conceivable corrupt endeavor to avoid waiving the statute's application to one type of corrupt endeavor." *Id.* at 1409.

The court then considered caselaw under the general obstruction of justice statute, 18 U.S.C. §§ 1503, 1505, which contain similar "corruptly endeavors" language. Quoting *United States v. Griffin*, 589 F.2d 200, 206-07 (5th Cir.), *cert. denied*, 444 U.S. 825, 100 S.Ct. 48, 62 L.Ed.2d 32 (1979), which in turn quoted *Anderson v. United States*, 215 F.2d 84, 88 (6th Cir.) *cert. denied*, 348 U.S. 888, 75 S.Ct. 208, 99 L. Ed. 698 (1954), the court in *Martin* stated:

> The obstruction of justice statute was drafted with an eye to "the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined."

747 F.2d at 1409.

[2] The meaning of "corruptly" as used in §7212(a) and in the general obstruction of justice statute was explained more recently in *United States v. Reeves*, 752 F2d 995 (5th Cir.) *cert. denied*, 474 U.S. 834, 106 S.Ct. 107, 88 L.Ed.2d 87 (1985). In *Reeves* the district court had defined "corruptly" as meaning done "with improper motive or bad or evil purpose." *Id.* at 997. The court of appeals disagreed, and reversed on this ground. Reasoning that to define "corruptly" in this way would render the "key word" redundant and could potentially raise questions of overbreadth and vagueness, the court concluded that "corruptly" is used for the purpose of "forbidding those acts done with the intent to secure an unlawful benefit either for oneself or for another." *Id.* at 1001. The court made this determination after considering cases under the general obstruction of justice statute as well as the legislative history of §7212(a). In adopting

this definition, the *Reeves* court declined to follow an earlier Fifth Circuit case decided under the "plain error" standard. *See United States v. Partin*, 552 F.2d 621 (5th Cir. 1977). *Partin* was one of the cass cited by this court in *Martin* and by which the Court was "guided" in construing "corruptly" as used in §7212(a).

We agree with the definition adopted in *Reeves*. It comports with our view that "corruptly" was used in §7212(a), as in the general obstruction of justice statute, to prohibit all activities that seek to thwart the efforts of government officers and employees in executing the laws enacted by Congress. In a system of taxation such as ours, which relies principally upon self-reporting, it is necessary to have in place a comprehensive statute in order to prevent taxpayers and their helpers from gaining unlawful benefits by employing that "variety of corrupt methods" that is "limited only by the imagination of the criminally inclined." *Martin*, 747 F.2d at 1409. We believe that §7212(a) is such a statute and that the use of "in any other way corruptly" in the second clause gives clear notice of the breadth of activities that are proscribed.

IV.

[3] The question remains whether the evidence in this case established a violation of §7212(a), even under the reading we have given the statute. After examining the trial record, and particularly the tapes of conversations between the defendant and Musick, we find that the evidence is sufficient to support the defendant's conviction for violating §7212(a). Thus, the district court correctly denied his motion for a judgment of acquittal.

The record reveals that the defendant did create the California corporation for the purpose of enabling Musick to disguise the character of illegally earned income and to repatriate it. Popkin acted corruptly, moreover, because at least one intent in creating the corporation was to secure an unlawful benefit for his client. The purpose of the corporation went beyond repatriating money held in a foreign bank. It provided a means, in creating a paper loss from inter-corporate transactions, by which the funds held abroad and repatriated appeared to be

less than the actual amount of untaxed money that Musick should have reported for 1983 and 1984.

At the first monitored meeting on March 26, 1985, Musick stated three objectives for which he was seeking the defendant's help:

1. He wanted to retrieve approximately $220,000 that he had made on two cocaine deals in 1983 and 1984, from a foreign account controlled by Mid-America Financial;

2. He wanted to "surface and start making a living, showing a living" by getting into building and real estate in California;

3. He wanted to avoid paying full income taxes on the $220,000. As Musick said to the defendant, "I wanna pay taxes a little bit, but, you know, I don't wanna get raped again, you know." He also wanted to avoid acknowledging an interest bearing foreign account.

Musick asked the defendant for suggestions because his associates at Mid-America Financial were not tax specialists and did not want any problems with the IRS while "doin a service." He also told the defendant that he was "very vulnerable to IRS" and didn't want to be tied into the foreign account that was in Mid-America Financial's name. With this background, the defendant advised Musick, "the best thing you can do is go into your own business" because capital infusion is different from loans and other cash transactions. Ultimately the defendant advised Musick to issue stock in his new corporation to Mid- America Financial for $200,000, then report "bad business" and buy the stock back for $3,000 to $10,000. The people at Mid- America could not get hurt—they were just providing a service all along. Once the stock was repurchased for $3,000 to $10,000 Musick would again own 100% of the new corporation, and the corporation would have the $200,000. At the end of these various steps, the defendant advised that this money would be "just plain old money that you sold stock for."

The effect of all these maneuvers would be more than just to disguise the source of the money thus repatriated. It would also place in Musick's wholly owned corporation the power to

determine when, if ever, the $200,000 earned in 1983 and 1984 would be reported for income tax purposes. The income tax laws require annual reporting of all income *in the year earned*. The entire system is built on the basis of annual reporting, and any arrangement that permits a taxable entity to avoid reporting income in the taxable year when earned has the effect of skewing the system and thus impeding or obstructing the due administration of the tax laws.

A review of the entire record leaves no doubt that the defendant endeavored to impede or obstruct the due administration of the tax laws in the advice he gave Musick. He was clearly aware that one of Musick's three purposes was to avoid paying the full tax on his 1983 and 1984 drug-related earnings. Throughout the conversation of March 26 the defendant referred to the tax issue as well as the need to disguise the illegal source of the money and repatriate it. While it involved "laundering" $200,000, the plan the defendant proposed involved more than money laundering. It was designed also to secure an unlawful tax benefit for Musick, an endeavor that §7212(a) prohibits.

The judgment of the district court is AFFIRMED.

RONEY, senior circuit Judge, dissenting:

I respectfully dissent.

Although the indictment as originally written may have made sufficient allegations to state a crime under this statute, the amended indictment, which deletes the allegations concerning the preparation of false returns, fails to do so. The Government, by insisting upon prosecuting the defendant under this statute distorts the meaning and purpose of the statute. That the defendant committed acts in violation of the criminal laws of the United States is not the question. If the acts charged did not violate this statute, then the indictment should have been dismissed and the Government should be forced to proceed under the statutes which Congress intended for prosecution of defendant's transgressions.

The indictment against Popkin alleged that he "did corruptly obstruct and impede and endeavor to obstruct and impede the due administration of Title 26, United States Code, by creating

a California corporation for Stephen Musick to disguise the character of illegally earned income and repatriate it from a foreign bank."

The purpose of forming this corporation was to repatriate funds located in an offshore account back into this country. This is a consummate example of money laundering which would have been punishable under 18 U.S.C. §1956 had the acts been committed after its passage in 1986. It is clear that the primary purpose in forming the corporation was to get the money back into the country. Nothing concerning taxes or much of Popkin's activity relied upon by the court was alleged in the indictment in itself. After striking the accusations concerning filing false returns, the indictment alleges only that the defendant created a corporate entity for the purpose of disguising illegal income in violation of Title 26. The indictment does not allege and the Government even now does not satisfactorily explain how this without more violates the tax laws. Although the illegal nature of the funds would have been successfully concealed, Musick still could have paid any tax obligations owed on the money without violating the tax laws at all.

It is important to bear in mind that the defendant has not been convicted of aiding and abetting or assisting in the violation of the tax laws under either 18 U.S.C. §7206 or under the general federal aiding and abetting statute, 18 U.S.C. §2, but has instead been charged with the substantive offense of corruptly impeding or endeavoring to impede the due administration of the tax laws. The record in this case does not establish that he has done this.

The statute under which this indictment was brought is set forth under "Sec. 7212 Attempts to interfere with the administration of internal revenue laws. (a) Corrupt or forcible interference."

The defendant's major argument is that an essential element of Sec. 7212(a) of Title 26 is that the act or conduct of the accused involve the use of force or threats against the person of a particular government agent. Although this argument was properly rejected by the court in this case, the word "corruptly" should not be so easily written out of the statute. The court's

interpretation of this section of the tax law has the effect of virtually eliminating the word "corruptly" from the statute. The statute requires that the defendant must "corruptly" obstruct or endeavor to obstruct the execution of the tax laws. This should mean something more than just obstructing the execution of the laws as a matter of fact. There is nothing inherently "corrupt" about the formation of a corporation.

Almost without exception, the reported cases concerning a prosecution under this Act have involved some act that would be either illegal under state or federal law or would tend to be corrupt independently of its purpose. See *United States v. Ratcliff*, 806 F.2d 1253 (5th Cir. 1986) (threatening telephone calls to agent); *United States v. Sciolino*,, 505 F.2d 586 (2d Cir. 1974) (flash picture of agent and display of cartridge box); *United States v. Johnson*, 462 F.2d 423 (2d Cir. 1972) (defendant barred entry into building; said agents could enter over his dead body; scuffle ensued and defendant assaulted arresting agents); *United States v. Varani*, 435 F.2d 758 (6th Cir. 1970) (letter threats of violence against agent); *United States v. Rybicki*, 403 F.2d 599 (6th Cir. 1968) (defendant appeared in his doorway holding a double-barreled shotgun); *United States v. Guthrie*, 385 F.2d 410 (7th Cir. 1967) (defendent threatened that "he might shoot any government agents who approached him in connection with the investigation"); *United States v. Reeves*, 752 F.2d 995 (5th Cir. 1985) (filing frivolous lien against residence of IRS investigator). In each case, there was a retaliatory element against the agent or the Internal Revenue Service.

Such is the case in the prosecutions under 18 U.S.C. §1503 cited in the Court's opinion. *United States v. Griffin*, 589 F.2d 200, 206-07 (5th Cir. 1979) (testifying falsely before a federal grand jury); *United States v. Partin*, 552 F2d 621 (5th Cir. 1977) (inducing witness not to appear and to testify falsely); *Anderson v. United States*, 215 F.2d 84 (6th Cir. 1954) (effort to alter testimony of witnesses).

In *United States v. Hylton*, 710 F.2d 1106 (5th Cir. 1983), the Court held that the filing of non-frivolous trespass complaints against IRS agents did not violate §7212(a), even though the action may have been motivated by a desire to impede the

agent's investigation. In other words, legal activity is not proscribed by §7212(a), even though it is undertaken for the purpose of impeding or obstructing the execution of the tax laws.

The only case cited not dealing with actions interfering directly with agents of the IRS is *United States v. Williams*, 644 F.2d 696 (8th Cir. 1981), in which the defendant was convicted under §7212 for encouraging others to submit false W-4 forms. In that case, the "corrupt" action involved a direct interference with and violation of IRS procedures and regulations.

In this case, the single allegationof activity is that the defendant created a corporation, lawful act under the laws of California. Without the allegation of false tax returns, the defendant is not charged with a corrupt act, but simply charged with forming a corporation for the purpose of laundering money.

No other case under this section involves the setting up a corporation for potential use as a tax shield. Every case cited other than *Williams* in the statute's thirty-seven year history involved actions which directly interfered with IRS agents attempting to carry out their jobs. A reading of the statute itself reveals why. Aside from the caption for the statute, virtually the entire text is directed at either the direct or indirect use of activity against agents of the IRS which have the effect of obstructing or interfering with the enforcement of the tax law. This is not a statute designed for that purpose. *See, e.g.*, 18 U.S.C. §7201.

The legislative history reveals that Congress intended only to prohibit interference with IRS agents, either through physical or verbal threats or through other actions which impeded their efforts to enforce the tax code. The court in *United States v. Walker*, 514 F.Supp. 294, 304-05 (E.D.La. 1981), reviewed the history of this provision and traced its origins to two previous acts, Section 3601(c) of the Internal Revenue Code of 1939 and Section 38 of the Internal Revenue Act of 1864, both of which dealt solely with interference directed at agents of the IRS. The Senate Report on §7212 also speaks only of acts which impeded the ability of IRS agents to perform their function. S.Rep. No.

1622, 83rd Cong., 2d Sess. 1954, *reprinted in* [1954] U.S. Code Cong. & Admin. News 4621, 5254.

The defendant was simply tried under the wrong statute. I would reverse the conviction.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-8961

UNITED STATES OF AMERICA,

Plantiff-Appellee,

versus

GERALD M. POPKIN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING
November 13, 1991

BEFORE: ANDERSON, Circuit Judge, RONEY*, and LIVELY**, Senior Circuit Judges.

PER CURIAM:
The petition(s) for rehearing filed by appellant Gerald M. Popkin is denied.

ENTERED FOR THE COURT:

United States Circuit Judge

*See Rule 34-2 (b), Rules of the U.S. Court of Appeals, for the Eleventh Circuit.
**Honorable Pierce Lively, Senior Circuit Judge of the Sixth Circuit, sitting by designation.

(2)

No. 91-1281

Supreme Court, U.S.
FILED
APR 8 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

GERALD M. POPKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether an act that is not otherwise unlawful violates 26 U.S.C. 7212(a) when it is corruptly committed for the purpose of obstructing or impeding, or endeavoring to obstruct or impede, the due administration of the internal revenue laws.

2. Whether a violation of 26 U.S.C. 7212(a) requires the use of force or threats of force directed against a particular government employee.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1281

GERALD M. POPKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18-34) is reported at 943 F.2d 1535.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1991. A petition for rehearing was denied on November 13, 1991. Pet. App. 35. The petition for a writ of certiorari was filed on February 6, 1992. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on one count of corruptly endeavoring to obstruct or impede the due administration of the Internal

Revenue Code, in violation of 26 U.S.C. 7212(a).[1] Petitioner was sentenced to a term of imprisonment of a year and a day, and was ordered to pay restitution to the government in the amount of $6,755. Pet. App. 18-22.

1. In 1978, petitioner, who was a practicing attorney, assisted his client Stephen Musick in the preparation of a false income tax return. That return misrepresented the source and amount of Musick's 1977 income, which was approximately $250,000 and was derived from Musick's involvement in drug transactions.

Petitioner and Musick had no further contact until 1985, when Musick approached petitioner as part of a government sting operation and informed him that he had earned approximately $200,000 on cocaine deals while he was in prison for drug crimes. Pet. App. 20.[2] Musick told petitioner that he wanted to get into the construction and real estate business in California, but that he first had to legitimate the drug income he had earned in prison. Musick told petitioner that his money from the drug deals was being held by an entity called Mid-America Financial in an offshore account, and that he needed assistance in repatriating the money through a transaction that would disguise the source of the funds and reduce the taxes to be paid on them. *Ibid.*

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[1] Petitioner was charged in a three-count indictment with aiding and assisting in the preparation of false income tax returns, in violation of 26 U.S.C. 7206(2) (Counts 1 and 2), and with corruptly endeavoring to obstruct or impede the due administration of the internal revenue laws, in violation of 26 U.S.C. 7212(a) (Count 3). The jury returned verdicts of not guilty on Counts 1 and 2, and guilty on Count 3.

[2] After his involvement with petitioner in 1978, Musick pleaded guilty to cocaine distribution charges and was imprisoned. While he was serving his prison term, Musick provided information to federal agents concerning his 1978 dealings with petitioner. The agents subsequently asked Musick to participate in the sting operation. Pet. App. 20.

Petitioner suggested a complicated scheme to legitimate the drug money. First, petitioner would form a California Corporation for Musick. Musick would then sell stock in the new corporation to Mid-America Financial for $200,000, would report heavy losses in the new corporation and then repurchase the stock from Mid-America for $3,000 to $10,000. Petitioner cautioned Musick to comply with the formal requirements for running a corporation in order to maintain the proper corporate appearance. Later the same day, petitioner met with Musick and two undercover agents posing as representatives of Mid-America Financial. The parties discussed the formation of Musick's new corporation and methods of repatriating Musick's offshore funds. Pet. App. 20-21.

In April 1985, petitioner and Musick met with the two undercover agents at Mid-America's office in St. Louis. At the meeting, petitioner gave Musick personal tax returns for 1983 and 1984 that petitioner had prepared. Those returns showed gross income of $50,000 for each year. This sum was reported only as gross receipts or sales without any further indication of its source. Those returns were never filed. Pet. App. 21.[3]

After these meetings, petitioner set up the S. Musick Corporation in California, obtained a corporate seal, which petitioner mailed to Musick, and registered the corporation with the State of California. Petitioner billed Musick a total of $1,755 for costs associated with the formation of the corporation. That bill was paid by

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[3] Before the case was submitted to the jury, Count 3 of the indictment was amended to delete references to the tax returns, which were described in Counts 1 and 2. Therefore, the charge against petitioner in Count 3 was based solely on the allegation that he corruptly obstructed and impeded, and endeavored to obstruct and impede, the due administration of the internal revenue laws by creating a corporation for Musick for the purpose of hiding income and its source. Pet. App. 22.

Mid-America Financial. Petitioner also received $5,000 for the preparation of the two income tax returns. Pet. App. 21.

2. The court of appeals affirmed. Pet. App. 18-34. The court first rejected petitioner's argument that 26 U.S.C. 7212(a) requires the use of force or threats of force against a government agent. Pet. App. 23. The court held that the second clause of Section 7212(a), the clause under which petitioner had been charged, prohibited "any act that either obstructs or impedes or endeavors to obstruct or impede, the 'due administration' of the Internal Revenue Code." Pet. App. 26. The court further held that the second clause of Section 7212(a) does not require that the prohibited conduct be directed at any particular government agent. Pet. App. 26.

The court also rejected petitioner's contention that the creation of the corporation did not obstruct and was not intended to obstruct or impede the due administration of the Internal Revenue Code. The court found that the evidence was sufficient to show that petitioner created the corporation "for the purpose of enabling Musick to disguise the character of illegally earned income and to repatriate it." Pet. App. 28. The court found that petitioner acted corruptly "because at least one intent in creating the corporation was to secure an unlawful benefit for his client." *Ibid.*

ARGUMENT

1. Petitioner argues (Pet. 4-7) that his conviction violates due process because the formation of a corporation is not an inherently illegal activity and thus could not have violated Section 7212(a). He claims (Pet. 4-5) that an act done with the purpose of obstructing the due administration of the internal revenue laws does not violate Section 7212(a) if the act itself is not illegal. That claim has no merit.

Petitioner's position is contrary to the plain language of Section 7212(a). Section 7212, which is entitled "Attempts to interfere with administration of internal revenue laws," provides in part:

> (a) Corrupt or Forcible Interference.
>
> Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title *or in any other way corruptly* or by force or threats of force (including any threatening letter or communication) *obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title*, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. * * *

26 U.S.C. 7212(a) (emphasis added). The emphasized language defines petitioner's offense and contains no requirement that the underlying act itself be otherwise illegal. To the contrary, that language reaches the conduct of any person who "in any * * * way corruptly" obstructs or impedes, or endeavors to obstruct or impede, the due administration of the tax laws. An otherwise lawful act is therefore illegal when it is the means of corruptly obstructing or attempting to obstruct the administration of the tax laws.[4]

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[4] There is nothing novel about this principle. For example, there is nothing inherently illegal about mailing a letter, but it is illegal to use the mails for fraudulent ends. See 18 U.S.C. 1341. In short, it is clear that an inherently legal act can be made illegal if it is done with criminal intent.

Petitioner's reliance on *United States* v. *Hylton*, 710 F.2d 1106 (5th Cir. 1983), is misplaced. In *Hylton*, the Fifth Circuit held that where a defendant's actions "represent[ed] a legitimate and protected exercise of her [First Amendment] right to petition for the redress of grievances," she could not be convicted of violating Section 7212 based upon her filing of nonfraudulent trespass complaints against IRS agents. 710 F.2d at 1111. Unlike the defendant in *Hylton*, petitioner cannot claim that he had a constitutionally protected right to create a corporation so that Musick could fraudulently repatriate his money, disguise its character, and pay "less than full income taxes" (Pet. App. 20). See *United States* v. *Reeves*, 782 F.2d 1323, 1326 (5th Cir.) (filing of frivolous common law liens with intent to secure improper benefits or advantages prohibited under Section 7212(a) and did not constitute petition for redress), cert. denied, 479 U.S. 837 (1986).

2. Petitioner also contends (Pet. 7-17) that the court of appeals erred in holding that Section 7212(a) is not limited to cases involving the use of force or threats of force directed against a government employee.

a. On its face, Section 7212(a) prohibits efforts to impede the due administration of the tax laws both through the corrupt use of force or threats of force against federal officers or agents, or through corrupt efforts to accomplish the same end "in any other way." The first clause of the statute makes it a crime to endeavor, corruptly or by force or threats of force, to "intimidate or impede any officer or employee of the United States acting in an official capacity under [the Internal Revenue Code]." The second clause, under which petitioner was charged, makes it unlawful for any person "in any other way corruptly or by force or threats of force * * * [to] obstruct[] or impede[], or [to] endeavor[] to obstruct or impede" the administration of the tax laws. The two

clauses, which are separated by the word "or," plainly state alternative means of violating the statute. Only the first clause requires proof of the use of force or threats of force against a government agent. Under the second, and broader, clause, any corrupt endeavor to obstruct or impede the administration of the tax laws is illegal, regardless of whether it involves force or a threat of force against any federal officer or employee.

b. Contrary to petitioner's assertion, the legislative history of the statute does not command a reading that is contrary to its plain language. Indeed, the legislative history supports application of Section 7212(a) to conduct not involving force or the threat of force against an employee or agent of the IRS.

Congress enacted the current version of Section 7212(a) as part of the Internal Revenue Code of 1954. The statute was patterned after 18 U.S.C. 111, which prohibits forcible assault on a federal employee engaged in the performance of his duties, but it was broader "in that it covers threats of force (including any threatening letter or communication) or corrupt solicitation." H.R. Rep. No. 1337, 83d Cong., 2d Sess. A427 (1954); see also S. Rep. No. 1622, 83d Cong., 2d Sess. 604 (1954). See *United States* v. *Martin*, 747 F.2d 1404, 1408-1409 (11th Cir. 1984) (reviewing legislative history of Section 7212); *United States* v. *Walker*, 514 F. Supp. 294, 304-305 (E.D. La. 1981) (same). In noting that the statute covers corrupt solicitation, the House Report clearly indicates that Congress intended the statute to reach conduct not involving force or the threat of force.

c. The case law also does not support petitioner's position. Petitioner asserts (Pet. 12-17) that the courts have applied Section 7212 only to cases that involve the use of force or threats of force.[5] Even if that were cor-

[5] Petitioner also relies (Pet. 11) on the fact that in *United States* v. *Henderson*, 386 F. Supp. 1048 (S.D.N.Y. 1974),

rect, it would "prove[] nothing," as the court of appeals correctly noted. Pet. App. 26. This Court pointed out in *Parr* v. *United States*, 363 U.S. 370, 391 (1960), that "the fact [that] there is no reported decision involving similar factual circumstances or legal theories is not determinative." On the contrary, "[w]hat is determinative is the clear language of the statute," which "conspicuously omits the requirement that [the] conduct be directed at 'an officer or employee of the United States Government.' " Pet. App. 26.

In any event, contrary to petitioner's assertion (Pet. 12), several courts have applied Section 7212(a) to cases not involving the use of force or threats of force against a government employee. See *United States* v. *Yagow*, 953 F.2d 423 (8th Cir. 1992) (sending false IRS forms 1099 to individuals and filing false forms 1099 with the IRS); *United States* v. *Reeves*, 782 F.2d at 1326 (filing frivolous common law liens); *United States* v. *Williams*, 644 F.2d 696, 701 (8th Cir.) (assisting in the preparation and filing of false W-4 forms), cert. denied, 454 U.S. 841 (1981); *United States* v. *Martin*, 747 F.2d at 1408-1410 (filing false complaints).

As one court has explained, Section 7212 prohibits all efforts to impede "the collection of one's taxes, the taxes of another, or the auditing of one's or another's tax

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the government argued that Section 7212 "apparently applies only to acts or threats of physical violence." 386 F. Supp. at 1054-1055. Petitioner's reliance is misplaced. First, the district court in that case properly rejected the argument as unpersuasive. The court thought that Section 7212 clearly applied to the defendant's submission "during an audit of a false, fictitious and back-dated document." 386 F. Supp. at 1050, 1056. Moreover, the government " 'is not disqualified from changing its mind' concerning the construction of a statute." *Garcia* v. *United States*, 469 U.S. 70, 79 (1984) (quoting *NLRB* v. *Iron Workers*, 434 U.S. 335, 351 (1978)).

records." *United States* v. *Reeves*, 752 F.2d 995, 998 (5th Cir), cert. denied, 474 U.S. 834 (1985); see also *United States* v. *Yagow*, 953 F.2d at 426-427. By establishing a corporation in an attempt to impede the collection of Musick's taxes and to impede the auditing of Musick's records, petitioner violated Section 7212(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1992